

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
BIRCHWOOD ASSOCIATES	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

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Petitioner, Birchwood Associates, 410 East Jericho Turnpike, Mineola, New York 11501, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 802267).

On October 19, 1987 petitioner, by its duly authorized representative, Lowenthal, Landau, Fisher & Ziegler, P.C., Esqs. (Stephen S. Ziegler, Esq., of counsel), and the Audit Division, by its duly authorized representative, William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel), waived a hearing and submitted this matter for determination based upon a Stipulation of Facts (with annexed exhibits), together with briefs previously submitted on a companion matter involving the same issues presented in this case (as well as one other issue).<sup>1</sup> After due consideration, Dennis M. Galliher, Administrative Law Judge, issues the following determination.

ISSUES

I. Whether petitioner's purchase price for certain shares of cooperative housing corporations should be based on an allocation of petitioner's costs for the underlying properties (prior to transfers thereof to the corporations) rather than the corporations' costs for such

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<sup>1</sup>The one other issue not specifically presented herein and, accordingly, not addressed, is that of the so-called "negative carry" sought by petitioner in the companion matter (the excess of maintenance and management costs over gross rents derived from apartment units the shares to which have not been transferred to a cooperative apartment unit purchaser).

properties.

II. Whether mortgage indebtedness should be allocated to and included in the selling price of certain shares of cooperative housing corporations as sold by petitioner.

III. Whether petitioner has established that penalties asserted by the Audit Division for failure to timely file certain returns and failure to timely remit tax due should be abated.

FINDINGS OF FACT

On September 23, 1987, authorized representatives for petitioner (Stephen S. Ziegler, Esq.) and for the Audit Division (Paul A. Lefebvre, Esq.) executed a Stipulation of Facts pertaining to the matter at issue. This stipulation, modified herein only insofar as to delete references to various documents included with the stipulation as exhibits (the existence and authenticity of which documents are not disputed), provides as follows:

1. Birchwood Associates ("Birchwood") is a New York general partnership with offices at 410 East Jericho Turnpike, Mineola, New York 11501.

2. Prior to January 1982, Birchwood built and thereafter operated the apartment houses known as 17-85 215th Street, Bayside, Queens ("17-85"); 18-05 215th Street, Bayside, Queens ("18-05"); and 18-15 215th Street, Bayside, Queens ("18-15") (hereinafter sometimes collectively referred to as the "Properties").

3. In January 1982, Birchwood sold each of the 17-85, 18-05 and 18-15 Properties to cooperative housing corporations (the "CHCs") named respectively, 17-85 215th Street Owners, Inc.; 18-05 215th Street Owners, Inc.; and 18-15 215th Street Owners, Inc., as more specifically set forth below.

4. Birchwood's costs for the Properties at the time of the transfers to the CHCs were as follows:

17-85	\$9,996,589
18-05	9,651,413
18-15	9,601,717

5. The terms of the transfers to the CHCs were as follows:

(a) On January 19, 1982, January 26, 1982 and January 21, 1982 (the "closing dates"),

Birchwood sold the Properties to the CHCs for sales prices payable as follows:

	<u>17-85</u>	<u>18-05</u>	<u>18-15</u>
Cash, Subscribers' Notes and allowances	\$10,109,571	\$ 3,183,835	\$ 3,048,022
CHCs' acquiring property subject to mortgage payable to The Bowery Savings Bank (the "Mortgage")	4,151,124	4,151,124	4,151,124
CHCs' issuance to Birchwood of Unsold Shares valued at a price of \$55 per share	<u>2,375,395</u>	<u>8,236,910</u>	<u>8,208,035</u>
Total Sales Price	\$16,636,090	\$15,571,869	\$15,407,181
Divided by Shares	<u>197,512</u>	<u>190,693</u>	<u>190,693</u>
Cost to CHC per share	\$ <u>84.2282</u>	\$ <u>81.6594</u>	\$ <u>80.7957</u>

(b) On each respective closing date, each CHC issued shares to two groups of persons, that is:

(i) as part of the consideration for the transfer of the Property to the CHC, the CHC issued shares to Birchwood, and

(ii) the CHC issued shares to persons other than Birchwood (i.e., the "Subscribers") for cash contributions to the CHC.

The shares issued by each CHC are as follows:

	17- <u>85</u>	18- <u>05</u>	18- <u>15</u>
Shares issued <u>to</u>			
Birchwood	43,189	149,762	149,237
Subscribers	<u>154,323</u>	<u>40,931</u>	<u>40,473</u>
	<u>197,512</u>	<u>190,693</u>	<u>189,710</u>

(c) The cash portion of the sales price for the Properties paid to Birchwood represented the proceeds from the issuance of the CHCs' shares to the Subscribers. By separate check and by closing adjustments, Birchwood paid to a reserve fund for the CHCs, \$500,000 in the case of 17-85 and \$30,000 in the case of each of the other Properties.

(d) In calculating the sales price received from the CHCs for the Properties for Federal and State income tax purposes, the Unsold Shares issued to Birchwood were valued at 45.8% of the offering price on an "as vacant" basis (\$120 per Share). The discount was based on the fact that the apartments relating to these Shares were occupied by persons who had the right to remain as tenants indefinitely under a noneviction plan and paying only such rent increases as authorized under the rent stabilization law.

6. Birchwood initially filed gains tax returns with regard to transfers of Unsold Shares in the Properties under Option A. Thereafter, with the Department's approval, later sales as to 18-05 and 18-15 (but not 17-85) were reported under Option B. The numbers of shares reported sold were as follows:

Option <u>A</u>	Option <u>B</u>	<u>Total</u>
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17-85	19,320	-0-	19,320
18-05	23,347	25,562	48,909
18-15	20,312	23,098	43,410

7. As of November 30, 1986, Birchwood had paid gains tax as follows:

	Option A Sales	Option B Sales	<u>Total</u>
17-85	\$120,858	-0-	\$120,858
18-05	199,879	\$ 74,816	274,695
18-15	<u>181,356</u>	<u>79,850</u>	<u>261,206</u>
	<u>\$502,093</u>	<u>\$154,666</u>	<u>\$656,759</u>

8. On January 9, 1985, Birchwood filed claims for refund of gains tax (the "Refund Claims"). The Refund Claims were made on the following two grounds (hereinafter referred to as the "Basic Issues"):

(a) the Mortgages on the CHCs' Properties should not be included in Birchwood's sales prices for the Unsold Shares, and

(b) Birchwood's cost for the Unsold Shares should be determined by reference to each CHC's cost for its respective Property, rather than by reference to Birchwood's original costs for each Property prior to transfer of each of the Properties to the respective CHC.

9. In reliance on the Basic Issues, Birchwood calculates the Refund Claims with regard to gains tax paid under Option A as follows:

	<u>17-85</u>	<u>18-05</u>	<u>18-15</u>
Sales Price	\$1,762,623	\$2,785,254	\$2,497,162
Less: Brokerage Fee	(24,088)	(38,821)	(31,617)
Less: Capital Improvements	<u>(47,050)</u>	<u>(74,655)</u>	<u>(63,990)</u>
Net Gain before purchase price	<u>\$1,691,485</u>	<u>\$2,671,778</u>	<u>\$2,401,555</u>
Less: Purchase Price			
Purchase Price per Share	\$ 84.2282	\$ 81.6594	\$ 81.2144
(¶ 5[a]) <sup>2</sup>			
x Number of Unsold Shares			

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<sup>2</sup>Paragraph references ("¶") refer numerically to the Findings of Fact herein.

transferred	x <u>14,069</u>	x <u>23,347</u>	x <u>20,312</u>
Purchase Price	<u>\$1,185,006</u>	<u>\$1,906,502</u>	<u>\$1,649,627</u>
Gain \$ 506,479	\$ 765,276	\$ 751,928	
x Tax Rate	x <u>10%</u>	x <u>10%</u>	x <u>10%</u>
Tax Due	\$ 50,648	\$ 76,528	\$ 75,193
Less: Tax Paid (¶ 7)	<u>(120,858)</u>	<u>(199,879)</u>	<u>(181,356)</u>
Refund Claimed	<u>\$ 70,210</u>	<u>\$ 123,351</u>	<u>\$ 106,163</u>

10. By letter dated April 3, 1985, the Department denied the Refund Claims.

11. On June 10, 1985, Birchwood filed a petition with the State Tax Commission for a redetermination of the decision of the Department denying its Refund Claims (the "Petition").

12. On October 4, 1985, Birchwood filed amended returns (the "Amended Returns") under Option B in regard to 18-05 and 18-15, but not in regard to 17-85.<sup>3</sup>

13. The Amended Returns under Option B were calculated on the basis of the Department's position in regard to the Basic Issues raised in the Refund Claims. In the Amended Returns, Birchwood calculated its estimated gain per share for 18-05 and 18-15 as follows:

(a) With Respect to 18-05:

<u>CONSIDERATION</u>	<u>PRESENT</u>	<u>ESTIMATED</u>	<u>TOTAL</u>
1. Actual Non-Grandfathered Sales	\$4,562,361		\$ 4,562,361
2. Estimated Future Sales		\$5,869,545	5,869,545
3. Mortgages Taken over by CHC	3,093,750		3,093,750
4. Less: Brokerage Fee - \$2 per share	<u>(70,802)</u>	<u>(213,438)</u>	<u>(284,240)</u>
5. CONSIDERATION	<u>\$7,585,309</u>	<u>\$5,656,107</u>	<u>\$13,241,416</u>
6. LESS: <u>COSTS</u>			
7. Purchase Price and Other Acquisition Costs	\$9,651,413		\$ 9,651,413
8. Capital Improvements	163,371	364,800	528,171
9. Expenses to Create Ownership			

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<sup>3</sup>Since approximately 95% of the Shares of 17-85 had been sold, i.e., gains tax returns had been filed and gains tax paid in regard thereto, Birchwood could not utilize Option B in calculating gains tax on the sales of 17-85 Shares.

in Cooperative Form			
10. Mortgage Amortization - Schedule	-0-	<u>86,569</u>	<u>86,569</u>
	<u>\$9,814,784</u>	<u>\$ 451,369</u>	<u>\$10,266,153</u>
11. LESS: Percent of Costs Attributable to Grandfathered Shares (25.472%)			
(\$ <u>2,500,022</u> )			
12. Cost Attributable to Taxable Shares			<u>\$ 7,766,131</u>
—			
13. Gain			\$ 5,475,285
14. LESS: Gain already reported on Option A sales <sup>4</sup>			<u>(1,998,930)</u>
15. Remaining Gain to be reported on Option B sales			\$ 3,476,355
16. Number of Taxable Shares under Option B (118,773 Shares) <sup>5</sup>		Divided by	<u>118,773</u>
17. GAIN PER SHARE			<u>\$ 29.27</u>
—			

(b) With Respect to 18-15:

<u>CONSIDERATION</u>	<u>PRESENT</u>	<u>ESTIMATED</u>	<u>TOTAL</u>
1. Actual Non-Grandfathered Sales	\$4,281,866		\$ 4,281,866
2. Estimated Future Sales		\$5,893,305	5,893,305
3. Mortgages Taken over by CHC	3,064,775		3,064,775
4. Less: Brokerage Fee - \$2 per share	<u>(65,822)</u>	<u>(214,302)</u>	<u>(280,124)</u>
5. CONSIDERATION	<u>\$7,280,819</u>	<u>\$5,679,003</u>	<u>\$12,959,822</u>

<sup>4</sup>Approximate tax paid per ¶ 9 (\$199,879) divided by .10.

<sup>5</sup>Total Shares 190,693  
[see \_\_\_\_ ¶ 5(b)(ii)]

Less: Grandfathered Shares  
(48,573)  
Less: Shares on which tax paid under  
Option A  
(23,347) [see \_\_\_\_ ¶ 6]  
Shares subject to Option B  
118,773

6. LESS: COSTS			
7. Purchase Price and Other Acquisition Costs	\$9,601,717		\$ 9,601,717
8. Capital Improvements	101,595	549,600	651,195
9. Expenses to Create Ownership in Cooperative Form			
10. Mortgage Amortization - Schedule	-0-	<u>86,552</u>	<u>86,552</u>
	<u>\$9,703,312</u>	<u>\$ 636,152</u>	<u>\$10,339,464</u>
11. LESS: Percent of Costs Attributable to Grandfathered Shares (26.17%) (\$ 2,539,357)			
12. Cost Attributable to Taxable Shares			<u>\$ 7,800,107</u>
—			
13. Gain			\$ 5,159,715
14. LESS: Gain already reported on Option A sales <sup>6</sup>			<u>(1,813,910)</u>
15. Remaining Gain to be reported on Option B sales			\$ 3,345,805
16. Number of Taxable Shares under Option B (119,750 Shares) <sup>7</sup>		Divided by	<u>119,750</u>
17. GAIN PER SHARE			<u>\$ 27.94</u>

14. By letter dated March 10, 1986, the Department confirmed the foregoing calculation of gains tax per share under Option B in regard to sales of Unsold Shares of 18-05 and 18-15.

15. If Birchwood's position on the Basic Issues is sustained, the Option B gain per Share

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<sup>6</sup>Approximate tax paid per ¶ 9 (\$181,356) divided by .10.

<sup>7</sup>Total Shares 189,710  
[see \_\_\_ ¶ 5(b)(ii)]

Less: Grandfathered Shares  
(49,648)  
Less: Shares on which tax paid under  
Option A  
(20,312) [see \_\_\_ ¶ 6]  
Shares subject to Option B  
119,750

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on 18-05 and 18-15 should be recalculated as follows:

(a) With Respect to 18-05:

<u>CONSIDERATION</u>	<u>PRESENT</u>	<u>ESTIMATED</u>	<u>TOTAL</u>
1. Actual Non-Grandfathered Sales	\$ 4,562,361		\$ 4,562,361
2. Estimated Future Sales		\$5,869,545	5,869,545
3. Mortgages Taken over by CHC	[omitted]		
4. Less: Brokerage Fee - \$2 per share	<u>(70,802)</u>	<u>(213,438)</u>	<u>(284,240)</u>
5. CONSIDERATION	\$ <u>4,491,559</u>	<u>\$5,656,107</u>	<u>\$10,147,666</u>
6. LESS: <u>COSTS</u>			
7. Purchase Price and Other Acquisition Costs	15,571,869		15,571,869
8. Capital Improvements <sup>8</sup>	[omitted]	364,800	364,800
9. Expenses to Create Ownership in Cooperative Form			
10. Mortgage Amortization - Schedule	-0-	<u>86,569</u>	<u>86,569</u>
	<u>\$15,571,869</u>	<u>\$ 451,369</u>	<u>\$16,023,238</u>
11. LESS: Percent of Costs Attributable to Grandfathered Shares (25.472%) (\$ 4,081,439)			
12. Cost Attributable to Taxable Shares			<u>\$11,941,799</u>
—			
13. Gain (Loss) 1,794,133)			(\$
14. LESS: Gain on Option A sales (as adjusted if Birchwood's positions are sustained <sup>9</sup> )			<u>(765,276)</u>
15. Remaining Gain to be reported on Option B sales 2,559,409)			(\$
16. Number of Taxable Shares			

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<sup>8</sup>Since this claim for refund is calculated on the basis of the corporation's cost for the Property, the expenditures exclude the capital improvements made by Birchwood totaling \$163,371.

<sup>9</sup>See ¶ 9.



under Option B <sup>10</sup>	Divided by	<u>\$ 118,773</u>
17. GAIN PER SHARE		<u>\$ 0</u>

(b) With Respect to 18-15:

<u>CONSIDERATION</u>	<u>PRESENT</u>	<u>ESTIMATED</u>	<u>TOTAL</u>
1. Actual Non-Grandfathered Sales	\$ 4,281,866		\$ 4,281,866
2. Estimated Future Sales		\$5,893,305	5,893,305
3. Mortgages Taken over by CHC	[omitted]		
4. Less: Brokerage Fee - \$2 per share	<u>(65,822)</u>	<u>(214,302)</u>	<u>(280,124)</u>
5. CONSIDERATION	\$ <u>4,216,044</u>	<u>\$5,679,003</u>	\$ <u>9,895,047</u>
6. LESS: <u>COSTS</u>			
7. Purchase Price and Other Acquisition Costs	\$15,407,181		\$15,407,181
8. Capital Improvements <sup>11</sup>	[omitted]	549,600	549,600
9. Expenses to Create Ownership in Cooperative Form			
10. Mortgage Amortization - Schedule	-0-	<u>86,552</u>	<u>86,552</u>
	<u>\$15,407,181</u>	\$ <u>636,152</u>	\$16,043,333
11. LESS: Percent of Costs Attributable to Grandfathered Shares (26.17%) (\$ <u>4,198,540</u> )			
12. Cost Attributable to Taxable Shares			<u>\$11,844,793</u>
13. Gain (Loss) 1,949,746)			(\$
14. LESS: Gain already reported on Option A sales (as adjusted if Birchwood			

<sup>10</sup>See Footnote "5".

<sup>11</sup>Since this claim for refund is calculated on the basis of the corporation's cost for the Property, the expenditures exclude the capital improvements made by Birchwood totaling \$101,595.

positions are sustained <sup>12</sup> )		(751,928)
15. Remaining Gain to be reported on Option B sales		(\$
2,701,674)		
16. Number of Taxable Shares under Option B <sup>13</sup>	Divided by	<u>119,750</u>
total shares		
17. GAIN PER SHARE		<u>\$ 0</u>

16. If Birchwood prevails on the Basic Issues, the refunds claimed are as follows:

	<u>17-85</u>	<u>18-05</u>	<u>18-15</u>
Option <u>A</u> - (See ____ ¶ 9)	<u>\$70,210</u>	<u>\$123,351</u>	<u>\$106,163</u>
Option <u>B</u>			
Shares Sold	-0-	25,562	23,098
x Gain per Share	<u>-0-</u>	-0-	-0-
Option B Gain (See ¶ 7)	--	-0-	-0-
x Rate of Tax	x <u>10%</u>	x <u>10%</u>	x <u>10%</u>
Option B Gains Tax	-0-	-0-	-0-
Less: Option B Tax Paid	<u>-0-</u>	<u>\$ 74,816</u>	<u>\$ 79,848</u>
(See ¶ 7)			
Option B Refund Claimed	\$ -0-	<u>\$ 74,816</u>	<u>\$ 79,848</u>
Refund Claimed			
(Option A and Option B)	<u>\$ 70,210</u>	<u>\$198,167</u>	<u>\$186,011</u>

17. By Notices of Tax Due dated March 4 and March 5, 1986, the Department assessed against 18-05 and 18-15, penalties and interest of \$8,439 and \$11,248, respectively.

18. Birchwood has protested the assessment of the penalties and interest and the Department is presently considering an audit agent's recommendation to waive the penalties and interest. The basis for the waiver is Tax Law § 1446.2(a), which provides as follows:

"If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty."

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<sup>12</sup>See ¶ 9.

<sup>13</sup>See Footnote "7".

Birchwood claims that it had "reasonable cause" for failure to pay the tax on the grounds that:

(a) after the Department authorized the use of Option B for purposes of calculating gains tax for sales of shares of CHCs, several months passed before the Department clarified the method of calculation under Option B, which, in turn, delayed the preparation and filing of gains tax returns by Birchwood on the basis of Option B; and

(b) while the Department, the Division of Tax Appeals and/or the courts may disagree with Birchwood's positions in the claim for refund (which give rise to the proposed tax deficiencies on which the penalties are based), Birchwood submits that there are reasonable grounds for said positions.

19. Birchwood and the Department agree that the Basic Issues are as follows:

(a) whether the CHCs' Mortgages should be included in Birchwood's sales price for the Unsold Shares (as determined by the Department);

(b) whether Birchwood's purchase price for the Unsold Shares should be determined by making an allocation of the CHCs' cost for the Properties (as claimed by Birchwood), rather than an allocation of Birchwood's cost for the Properties prior to transfer of the Properties to the CHCs (as determined by the Department); and

(c) whether there should be a waiver of penalty interest and penalties with respect to an issue if the Division of Tax Appeals decides against Birchwood on a Basic Issue.

20. Birchwood agrees that if the Department wins on any legal issue, Birchwood concedes that the gains tax should be calculated in regard to that issue as set forth in the Amended Returns with regard to 18-15 and 18-05 and in accordance with the Department's prior Notices of Tax Due in regard to 17-85. Thus, Birchwood concedes the Department's determinations of:

(a) the cost to Birchwood for the Properties which would be the cost for the Unsold Shares under the Department's position; and

(b) the allocation of the Mortgages to each unit for inclusion in the sales price of the

Unsold Shares under the Department's position.

21. The Department agrees that if Birchwood wins on the Basic Issues:

(a) the gains tax should be calculated as set forth in ¶ 9 in regard to the Option A sales and ¶ 15 in regard to the Option B sales; and

(b) Birchwood would be entitled to refunds as provided in ¶ 16. Thus, the Department concedes Birchwood's figures on the cost of the Properties to the CHCs.

22. The Audit Division retains the right to audit all future refunds on sales not covered by this stipulation.

23. The parties hereto agree that the Division of Tax Appeals shall render such decision as shall be proper upon the above facts and its interpretation of the legal issues set forth in ¶ 19.

#### CONCLUSIONS OF LAW

A. That Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of 10 percent on gains derived from the transfer of real property within New York State.

B. That petitioner asserts that in determining gain, the cooperative housing corporations' (CHCs') cost rather than petitioner's (sponsor's) cost is the appropriate measure of original purchase price to be allocated to the shares. Petitioner seeks, in essence, that the co-oping process should consist of two (potentially) taxable events, more specifically being (1) the transfer (closing) into the cooperative housing corporations and (2) transfers of (nongrandfathered) shares allocated to individual apartment units. In this case, petitioner maintains that since the transfers of the premises from petitioner to the cooperative housing corporations occurred prior to the March 28, 1983 effective date of Article 31-B, said transfers were "grandfathered" and would not be subject to gains tax. This results in a tax free "stepped basis" to petitioner for gains tax purposes. Petitioner does not assert that transfers of the shares allocated to individual apartment units occurring after March 28, 1983 (and not pursuant to pre-March 28, 1983 subscription agreements) are exempt because the realty transfers occurred prior to said date. Rather, petitioner would, by its method, be able to compute its gain on such share transfers based on the

increased (CHCs') original purchase price.

C. That petitioner's argument (in essence seeking a "stepped basis") must fail in light of the Court of Appeals decision in *Mayblum v. Chu* (67 NY2d 1008 [1986]). In *Mayblum*, plaintiffs sought a declaratory judgment "to establish that the transfer of real property underlying a cooperative corporation plan (the Gerard Towers transaction) [was] the taxable event under Tax Law Article 31-B...." The court, however, ruled against plaintiffs, indicating in its decision that gains tax "is imposed by the statute upon the overall cooperative plan...", that "the overall transaction [is] taxable", and that "for purposes of computation of the tax, the cooperative conversion is treated as a single transfer..." (*Mayblum v. Chu*, *supra*, at 1009 [emphasis added]).

D. That in light of the foregoing, petitioner's argument in favor of utilizing a two-transfer approach and basing gain herein on the CHCs' cost is rejected. The Court of Appeals, in essence, has described the entire co-oping process, for gains tax purposes, as one indivisible transaction, with tax to be computed in the sense of a single, overall transfer. Thus, to adopt petitioner's argument and break down into two steps what the Court in *Mayblum* concluded was to be treated as one transaction is not only unwarranted but, moreover, would appear to conflict directly with the Court's reasoning.

E. That the co-oping process aims ultimately at the receipt of gain by the sponsor via the transfer of shares allocated to the apartment units to unit purchasers. The provisions of Article 31-B which pertain specifically to cooperative conversions consistently speak to the transfer(s) of shares as the key (and culminating) event (see \_\_\_ e.g. Tax Law § 1442 which requires payment of tax on the date of transfer of each apartment unit; Tax Law § 1443.6 which makes a written agreement for the purchase of shares the "written contract" for purposes of the so-called grandfather exemption). Clearly the statutory scheme relative to co-ops, as well as the Court's decision in *Mayblum* commenting thereon, are consistent with the aim of the co-oping process and its end result. Given the nature of the co-oping process it is eminently reasonable to treat such process (the overall conversion plan) as a "single transfer" for purposes of computing the

tax, even though not so treated for purposes of date(s) of payment or for determining whether a given unit transfer is exempt via grandfathering. Such approach recognizes the potential hardship to a taxpayer (sponsor) in paying tax prior to the transfer of the units. It also recognizes that, in practical terms, the transfer(s) of consequence is the transfer(s) of shares to individual apartment units (the only way a cooperative corporation can transfer an interest in real property). There is nothing explicit or implicit in either the statute or the Mayblum case supporting a two transaction approach to computing tax liability. Rather, Mayblum, as noted, calls for a one overall transaction approach when calculating the tax. In fact, if accepted petitioner's approach would, specifically where the realty transfer occurred after March 28, 1983 (and not pursuant to a pre-March 28, 1983 contract), require two computations to determine tax liability.<sup>14</sup> Finally, petitioner notes that the Legislature did not adopt amendments to Article 31-B specifically setting forth the computational method utilized by the Audit Division, maintaining that this failure to specify such method is tantamount to rejection thereof. By contrast, however, it would appear that the Legislature saw no need to specify or clarify that in fact what it originally intended was being carried out in the Audit Division's method of computation in applying Article 31-B to the cooperative conversion process.

F. That with respect to the inclusion of mortgage indebtedness assumed by individual apartment unit purchasers (as allocated) as part of the consideration received by petitioners, such issue was decided by the State Tax Commission in Matter of Palmer Equities (State Tax Commn., December 13, 1985). In light of the foregoing discussion of Mayblum, and the attendant conclusion that there is no basis for treating the co-oping process as other than a single transaction for gains tax purposes, petitioner's assertion that a mortgage from a CHC to a sponsor should be separately dealt with (as part of a two transaction breakdown) is rejected. The Audit

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<sup>14</sup>As petitioner notes, assuming such circumstances its position would, in effect, accelerate the date of payment of some of the tax. Again, however, this approach is not consistent with the decision in Mayblum or with the payment date provisions of Tax Law § 1442.

Division's treatment of the mortgage indebtedness herein (as allocated) as consideration to petitioner is entirely consistent with the language of Tax Law § 1440.1(a) and the decisions in Mayblum (supra \_\_\_\_\_) and Palmer Equities (supra \_\_\_\_\_).

G. That Tax Law § 1446.2 provides, in part, that:

"[a]ny transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount for each month of delay or fraction thereof after the expiration of the first month after such return was required to be filed or such tax became due, such interest penalty shall not exceed twenty-five per centum in the aggregate. If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty."

H. That it is undisputed that as a result of the position taken by petitioner with respect to calculating its gains tax liability, the proper amount of tax was not timely remitted in connection with the transfers in question. Petitioner maintains, in defense of such filing/payment record, that at the time of the subject conversions, the gains tax was then newly enacted and many questions existed surrounding the computation of tax and the requirement for filing and remittance, specifically with respect to cooperative conversions. Further, petitioner asserts complete reliance was placed upon legal counsel regarding the manner of calculation of petitioner's gains tax liability. In turn, noting the then nonexistence of judicial construction of the tax, specifically with respect to cooperatives, it is asserted that counsel's advice constituted a reasonably taken position with respect to the manner of computing tax and remitting amounts due. Petitioner also asserts that its manner of filing clearly disclosed to the Audit Division the method of computation being utilized.

I. That petitioner's assertions, centered essentially upon an interpretation of the law different from that taken by the Audit Division, do not establish that penalty is inappropriate and do not support a conclusion that penalty should be abated. Initially, it is noted that guidelines as to the taxability of cooperative conversions including, specifically, computational explanations,

had been issued by the Audit Division and were available to the public well before petitioner's October 1985 change from Option A to Option B.<sup>15</sup> Further, it has been held, specifically with respect to gains tax penalties, that "the failure to pay a tax due to a different legal interpretation of a statute need not be considered 'reasonable cause'. In fact, if it were so considered, [the Commissioner] would rarely if ever be entitled to levy such penalties." (Matter of Harvey Auerbach v. State Tax Commn., Sup Ct, Albany County, March 27, 1987, Williams, J.) In sum, based on the facts, the Audit Division's imposition of penalties herein was appropriate and is sustained.

J. That the petition of Birchwood Associates is in all respects denied.

DATED: Albany, New York  
March 3, 1988

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ADMINISTRATIVE LAW JUDGE

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<sup>15</sup>Department of Taxation and Finance Publication 588, "Questions and Answers -- Gains Tax on Real Property Transfers", was issued in August 1983. Question and Answer number 20 in such publication, as well as Technical Services Bureau Memorandum 83-2(R), issued on August 22, 1983, discuss the taxability of and set forth the filing requirements for transferors of cooperative units. Not only were such guidelines issued and the Audit Division's position made known at an early point (some five months after enactment of the statute), but there is no evidence of any request by petitioner or its counsel to the Audit Division for enunciation or clarification of its position.